

CHAPTER 5

DEVELOPMENT LEASEHOLD

Section

5-101 Short title

5-102 Definitions

5-103 Notice of intent to enter into or substantially modify a development lease

5-104 Signatures and endorsements

5-105 Recordation fees and bonds

5-106 Submission of notice of intent

5-107 Deposit of fees and bonds

5-108 Certification and distribution of notice

5-109 Posting of notice of intent

5-110 Advisory services

5-111 Request for an expedited land title determination

5-112 Authority to enter into a development lease agreement

5-113 Statutory contents of a development lease agreement

5-114 Conditions made part of the agreement

5-115 Filings and recordings of development lease agreement

5-116 Civil sanctions for failure to make improvements

5-117 Covenants and judgments to run with the land

5-118 Extinguishment of responsibility and liability

5-119 Agreement to diminish lease payments where covenants implied or sanctions imposed declared null and void

5-120 Fiduciary responsibilities; penalties; forfeitures

5-121 Regulations

41 PC 5-101. Short title.

This chapter is known and may be cited as the “Pohnpei Development Leasehold Act of 1996.”

Source: S.L. No. 4L-21-96 §1, 10/25/96

41 PC 5-102. Definitions.

As used in this chapter, unless the context clearly requires otherwise, the following words shall have the following meanings:

- (1) “Commercial lease” means the lease of real property for the primary purpose of operating a business for profit.
- (2) “Development lease” means a commercial lease or combination of interconnected commercial leases that may contain an expanded term not to exceed the number of years specified in 41 PC 5-113 of this chapter when executed pursuant to this chapter.
- (3) “Development lease agreement” means a contract or agreement evidencing the existence of a development lease that has been executed in compliance with this chapter.
- (4) “Director” means the Director of the Department of Land and Natural Resources or the executive head of its successor in state law.
- (5) “Improvements to real property” means permanent additions to or betterments of real property, which improvements are more extensive than ordinary repairs and substantially enhance the value of the property.
- (6) “Lease” means a leasehold estate in real property within Pohnpei State, and all subleases and assignments of all or any portion thereof.
- (7) “Lessee” means the person, or group of persons acting in concert, who is the recipient of a leasehold estate, and his successors in interest.
- (8) “Leasehold estate” means the total, cumulative, and collective interests in real property that the lessor has transferred. Leasehold estate includes any and all rights, privileges or options to renew or extend a lease. Leasehold estate also includes concurrent leases, reversionary leases, cascading leases, and subsequent leases or series of leases issued to a singular lessee, or group of lessees acting in concert, or for a singular purpose or related group of purposes.

(9) “Leasehold option” or “option” means the legal right of one or more parties to a leasehold agreement to extend or renew the lease for a specific number of years.

(10) “Lessor” means the person, or group of persons acting in concert, who is the grantor of a leasehold estate, and his successors in interest.

(11) “Person” means and includes individuals, corporations, partnerships, and all other forms of legal association.

(12) “Term of the lease” means the maximum number of years under which any rights or privileges may be exercised or extended with respect to a leasehold estate under a leasehold agreement, inclusive of any rights, privileges or options to extend or renew the lease or any portion thereof, or to enter into a subsequent lease or series of leases with respect to the real property, or any interest therein that is the subject of the leasehold estate.

Source: S.L. No. 4L-21-96 §2, 10/25/96; S.L. No. 5L-14-00 §3-20, 10/1/00

41 PC 5-103. Notice of intent to enter into or substantially modify a development lease.

Any person desiring to acquire or to substantially modify the terms or purpose of a development lease in excess of the term limits established in Article 12 §1 of the Pohnpei Constitution or of the term limits applied generally for the lease of public trust lands, shall record notice of his intent to acquire or substantially modify such interest in the manner prescribed by 41 PC 5-106. The notice so recorded shall contain the following information:

(1) Name, address, and description of the prospective lessor and lessee who intend to be parties to the development lease agreement, including evidence of personal, corporate or other legally recognized forms of organization capable of leasing land and entering into valid and enforceable agreements;

(2) A copy of the proposed development lease agreement and all proposed related agreements pertaining to options to extend, modify or renew the lease agreement, and any other matter related to the terms or duration of the leasehold agreement;

(3) A copy, where available, of the most recent land title determination of rights and privileges of persons having an ownership interest in the property to be subject to the development lease issued by a qualified court of the Pohnpei Judiciary, or predecessor thereto;

(4) A description of the business or businesses that the lessee intends to conduct upon the premises;

(5) A statement of the expected contribution of the business to the overall development of the state;

(6) The number of years that the applicant has been engaged in the type of business for which the lease is being sought;

(7) The levels of capitalization that the applicant intends to invest in improvements to the real property to be subject to the lease and the applicant's financial abilities to carry out the responsibilities of emplacing the improvements upon the property and operating the business or businesses thereon;

(8) A summary description of the proposed improvements on the property and standards for the construction and maintenance of the improvements to the real property; and

(9) Such other information that the Director, in his discretion, deems necessary.

Source: S.L. No. 4L-21-96 §3, 10/25/96

41 PC 5-104. Signatures and endorsements.

Each notice submitted pursuant to 41 PC 5-103 for recordation shall contain the signatures of each person who shall be a lessee to the development lease for which the notice is made. The application shall also contain the signed endorsement of each person who will be a lessor to the lease. In the case such person is a trust, corporation or other form of legal personality, the application shall contain the signatures of each officer of that entity whose signature is required to authenticate a legally binding agreement of that entity of the type and nature of the proposed development lease. The signatures and endorsements required by this section shall be affixed to the notice solely for the purposes of this chapter, and shall not be construed as a binding obligation of the parties to enter into a lease agreement.

Source: S.L. No. 4L-21-96 §4, 10/25/96

41 PC 5-105. Recordation fees and bonds.

Each notice submitted for recordation pursuant to 41 PC 5-103 shall be accompanied by a non-refundable recordation fee of \$100 and a refundable bond equal to \$100 for each year of the term of the proposed lease.

Source: S.L. No. 4L-21-96 §5, 10/25/96

41 PC 5-106. Submission of notice of intent.

The notice of intent to enter or to substantially modify a development lease required by 41 PC 5-103, along with such recordation fees and bonds as are prescribed by 41 PC 5-105, shall be submitted by the prospective lessee to the Director of the Department of Land and Natural Resources.

Source: S.L. No. 4L-21-96 §6, 10/25/96; S.L. No. 5L-14-00 §3-20, 10/1/00

41 PC 5-107. Deposit of fees and bonds.

The recordation fee so paid upon submission of a notice of intent shall be deposited in the general fund of the Treasury as the realization of general revenues. The refundable bond shall be deposited in a special holding fund of the Treasury, and shall be returned to the payer or his designee if the prospective development lease agreement is not executed within the time limits prescribed by 41 PC 5-112, or, if so executed, on the fifth anniversary of the execution of the development lease upon a finding by the Director that the requisite capital improvements have been emplaced on the real property as prescribed by 41 PC 5-113(4); PROVIDED, HOWEVER, that such bonds shall be forfeited to the state if required by 41 PC 5-116(2).

Source: S.L. No. 4L-21-96 §7, 10/25/96

41 PC 5-108. Certification and distribution of notice.

Within five working days following his receipt of a notice of intent to enter or to substantially modify a development lease, the Director of the Department of Land and Natural Resources shall certify whether the submission meets the procedural requirements of 41 PC 5-104, 41 PC 5-105, and 41 PC 5-106 and so notify the prospective lessee. If the submission is incomplete, the Director shall return the submission to the prospective lessee stating his reasons why. Thereafter, the prospective lessee may resubmit a completed notice; PROVIDED that no additional recordation fee shall be required for a subsequent submission of said notice of intent. Upon the submission of a completed notice, the Director shall certify the submission and so notify the prospective lessee thereof and, within five working days thereafter, shall cause copies of the notice and his certification thereof to be distributed to the following entities:

- (1) The Pohnpei Economic Planning Commission;
- (2) The Pohnpei Land Use Planning and Zoning Commission;
- (3) The Office of the Attorney General;
- (4) The office of the chief executive of the local government of each locality wherein the lease lands are located; and
- (5) Where the proposed business to be situated on the development leasehold estate involves investment of non-FSM citizens, the Pohnpei Foreign Investment Board.

Source: S.L. No. 4L-21-96 §8, 10/25/96; S.L. No. 5L-14-00 §3-20, 10/1/00

41 PC 5-109. Posting of notice of intent.

In addition to the recordation of the notice of intent with the Director of the Department of Land and Natural Resources, the prospective lessee, within five working days following his receipt of the notification of affirmative certification by the Director, shall cause an announcement of intent to enter or substantially modify the development lease to be posted at the Pohnpei Supreme Court, the offices of the local government of each locality wherein the land is situated and at least three prominent places on the land that is to be subject to the lease. Said posting shall be on a form prescribed by the Director of the Department of Land and Natural Resources, shall specify the date of initial posting, and shall contain information on where to locate the full, recorded notice of intent.

Source: S.L. No. 4L-21-96 §9, 10/25/96; S.L. No. 5L-14-00 §3-20, 10/1/00

41 PC 5-110. Advisory services.

Any prospective lessor or other person showing an interest in the property to be leased may consult with the Department of Land and Natural Resources and the agencies listed in 41 PC 5-108 concerning the proposed development lease. Such information shall be given by the government without charge; PROVIDED, HOWEVER, that the advice so given shall be premised on a written waiver, signed by the person seeking the consultation, that the advice is gratuitously given and received and in no way obligates or binds the government with respect to the advice so given. In addition, the Department shall maintain and periodically update a list of lawyers and economic advisors, licensed to do business within the state, who have recorded with the Department their availability to provide professional advisory services to prospective lessors of development leasehold estates, which list shall be made available to the general public, upon request.

Source: S.L. No. 4L-21-96 §10, 10/25/96; S.L. No. 5L-14-00 §3-20, 10/1/00

41 PC 5-111. Request for an expedited land title determination.

Any lessor who wishes to make his land available for a development lease under the terms of this chapter and for whom a notice of intent has been recorded in accordance with this chapter may request the court of appropriate jurisdiction within the Pohnpei Judiciary for a determination of title and interest in the land that is to be the subject of the proposed development lease. Such request shall include a copy of the notice of intent for recordation certified as having been filed with the Department of Land and Natural Resources by the Director thereof. Upon the finding of an appropriate filing of the request herein specified, the court shall recognize that prompt rulings on the determination of title and interest to the real property that may be the subject of proposed development leases under this chapter are in the interest of the economic development of this state and, therefore, shall expedite the consideration and disposition of the matter.

Source: S.L. No. 4L-21-96 §11, 10/25/96; S.L. No. 5L-14-00 §3-20, 10/1/00

41 PC 5-112. Authority to enter into a development lease agreement.

The parties to a proposed development lease or substantial modification thereof who have complied with the statutory requirements of this chapter shall be eligible to enter or so modify a development lease agreement not sooner than 30 days nor more than 180 days following the receipt of an affirmative certification of the notice of intent by the Director of the Department of Land and Natural Resources as prescribed by

41 PC 5-108; PROVIDED that such period of authorization shall be extended for a period of 30 days following the final determination of title, should the prospective lessor petition the court for an expedited land title determination pursuant to 41 PC 5-111. Any purported agreement executed before or after the period herein prescribed that attempts to compel a lessor to enter or substantially modify a development lease agreement shall not be binding on the lessor. Neither shall the prospective lessee or any person acting on his behalf be entitled to the return of any valuable consideration provided as an inducement for the lessor to enter or substantially modify such a lease not paid within the period herein prescribed.

Source: S.L. No. 4L-21-96 §12, 10/25/96; S.L. No. 5L-14-00 §3-20, 10/1/00

41 PC 5-113. Statutory contents of a development lease agreement.

In addition to such provisions as the parties to the lease shall agree upon, each development lease agreement executed under this chapter shall contain:

- (1) The names of the lessee and lessor who are the parties to the development lease and the business purpose or purposes for which the development lease is to be let or substantially modified;
- (2) A description of the property for which the award is granted, the size of which shall be substantially related to the land requirements for the business or businesses for which the development lease is sought;
- (3) The maximum number of years for which the lease may be executed, but not in excess of 55 years;
- (4) A covenant stating the minimum value of improvements to the real property that is the subject of the lease that must be emplaced upon the property by the fifth anniversary of the issuance of the lease, the value of which shall not be less than \$200,000;
- (5) A covenant stating that any substantial change in the purpose for which the land is leased or that any voluntary assignment or sublease, or subsequent voluntary assignment or sublease of the development lease, or any portion thereof, by the lessee or his successor in interest to a third party must be approved by the lessor; provided that the agreement may include a statement that the approval of the lessor may not be unreasonably withheld upon the tender of adequate compensation therefor, as prescribed by Subsection (6) of this section; PROVIDED further that, unless the parties shall agree to a more restrictive covenant for the benefit of the lessor, failure of the lessor to object to a change in purpose or to an assignment or sublease within three years following actual or constructive notice to the lessor of such change in

purpose or assignment or sublease shall constitute a waiver of the lessor's right to withhold his consent thereto;

(6) A covenant stating that the lessor shall be entitled to not less than ten percent (10%) of the capital gains received by the lessee or his successors in interest for an assignment, sublease or subsequent assignment or sublease, of the leasehold estate or portion thereof; provided that the calculation of such capital gains shall not include investment less depreciation and reasonable business costs incurred by the lessee or his successors in interest with respect to improving the leasehold estate or developing the business activities thereon; and

(7) A covenant stating that the lessor shall have the rights of future benefit to the improvements placed on the land by or on behalf of the lessee and that, upon the termination of the lease, existing improvements thereon shall become the property of the lessor thereof or his successor in interest without further cost or condition to be met by the lessor, the title holder of the property or any successor in interest to said property; provided, however, that this subsection shall not be construed to limit the authority or ability of the lessor to require the lessee to remove improvements to the property for the purpose of rendering the property more suitable for future uses, where otherwise allowable under law.

Source: S.L. No. 4L-21-96 §13, 10/25/96

41 PC 5-114. Conditions made part of the agreement.

The statutory conditions prescribed by

41 PC 5-113 are hereby made a part by reference and operation of law of every development lease executed in Pohnpei State for the benefit of the lessor, notwithstanding their incorporation or non-incorporation in the written leasehold agreement. Any provision in a lease contract, agreement or subsequent agreement or contract that seeks to effectuate a waiver of the statutory provisions of 41 PC 5-113 to the detriment of the rights and privileges of the lessor contained therein is null and void as against public policy. Violation of any condition or covenant prescribed by said sections of this chapter to the detriment of the rights and privileges of the lessor shall be deemed a material breach of the lease agreement, that may be redressed by resort to judicial action.

Source: S.L. No. 4L-21-96 §14, 10/25/96

41 PC 5-115. Filings and recordings of development lease agreement.

Lease agreements executed under the authority of this chapter, and every amendment, modification or extension thereof, shall be filed and recorded with the Pohnpei Government in the same manner as the transfer of title to land in this state; PROVIDED that such filing shall include a copy of the certification of notice of intent executed by the Director of the Department of Land and Natural Resources as prescribed by 41 PC 5-108 and a signed and notarized statement signed by the lessee to the lease that the required posting of the notice of intent to enter or substantially modify the lease as required by 41 PC 5-109 has been complied

with. A leasehold agreement, amendment, modification or extension thereof not so filed and recorded shall not be enforceable against successors in interest in the subject property or any interest therein, real or personal, who receive the property or interest in good faith and without knowledge of the existing lease obligations thereon.

Source: S.L. No. 4L-21-96 §15, 10/25/96; S.L. No. 5L-14-00 §3-20, 10/1/00

41 PC 5-116. Civil sanctions for failure to make improvements.

(1) In addition to the civil sanctions as may be imposed under 41 PC 5-114, any lessee who, within five years of the execution of the leasehold agreement, fails to improve the leasehold estate at a value equal to or in excess of the valuation prescribed in the development agreement shall be liable for the payment to the lessor or his successors in interest of a civil fine of ten percent (10%) per year of the value of the improvements that have not been so made to the property.

(2) In addition to the civil fine imposed by Subsection (1) of this section, the bond paid for the filing of a notice of intent to enter or substantially modify a development lease as prescribed by 41 PC 5-105 shall be forfeited to the state.

(3) In addition to the civil sanction imposed by Subsection (1) of this section and the forfeiture of the bond as prescribed by Subsection (2) of this section, the court may order the defendants to the action to pay to the plaintiff parties who have brought or joined the action, the costs of bringing the legal action, inclusive of court charges and attorneys' fees, in accordance with the instructions of the court.

Source: S.L. No. 4L-21-96 §16, 10/25/96

41 PC 5-117. Covenants and judgments to run with the land.

Except as provided in 41 PC 5-118, all covenants required by 41 PC 5-113 and any judgment that shall be entered against a lessee of a development lease pursuant to 41 PC 5-116 shall be deemed to run with the lease, and all subsequent holders of the leasehold estate shall be liable for the performance of such covenants and the satisfaction of such judgments and all interest that shall have accrued with respect to said judgments.

Source: S.L. No. 4L-21-96 §17, 10/25/96

41 PC 5-118. Extinguishment of responsibility and liability.

The responsibility to comply with the statutory covenants as prescribed by 41 PC 5-113 and the liability to pay the civil penalties prescribed under 41 PC 5-116 shall be extinguished upon cancellation of the leasehold estate and the return of all leasehold interest thereunder to the lessor; provided, however, that the lessee shall remain liable for all costs incurred by the

lessor to enforce such covenants or to assess and collect such penalties; provided further that the lessee shall be liable for payments already adjudicated as due and payable to the lessor and shall not be entitled to any reimbursement of penalties already paid.

Source: S.L. No. 4L-21-96 §18, 10/25/96

41 PC 5-119. Agreement to diminish lease payments where covenants implied or sanctions imposed declared null and void.

Any agreement, whether direct or implied, between the parties to a lease agreement that the enforcement of a covenant specified in 41 PC 5-113 or the imposition of any sanction pursuant to 41 PC 5-116 will result in the diminution of lease payments to the lessor or his successor in interest is hereby declared to be null and void as against public policy.

Source: S.L. No. 4L-21-96 §19, 10/25/96

41 PC 5-120. Fiduciary responsibilities; penalties; forfeitures.

(1) Every official of, employee of or consultant under contract or assignment to the state government for whom advice is sought pursuant to 41 PC 5-110 shall act in a fiduciary capacity in providing advice to the individual so requesting the advice, and shall hold conversations with such person confidential. In addition, no such official, employee or consultant, at any time, may suggest to or in any other manner seek an arrangement with any party to the proposed development agreement, or to any party to the business to be established on the leasehold estate, or to any person whose interests are in opposition to those of the individual so requesting the advice, that would result in a direct or indirect financial, business or personal benefit for or that is intended to be to the advantage of the official, employee or consultant, or for any agent, disclosed or undisclosed, thereof, or for any business in which the official, employee or consultant hold a ten percent (10%) or more ownership interest therein, or in which or to which he holds a position of authority or influence.

(2) Any person who shall willfully and knowingly violate any provision of Subsection (1) of this section shall be guilty of an offense against this state and, upon conviction thereof, shall be sentenced to imprisonment for a period of not more than six months, or fined not more than \$1,000, or both such fine and imprisonment.

(3) Any financial, business or personal benefit received by any person on account of a violation of Subsection (1) of this section, whether or not there has been any criminal charges filed or adjudicated with respect thereto, shall be forfeit to the state; PROVIDED that such forfeiture shall not extend to properties received by third persons without knowledge, direct or implied, of the violation; PROVIDED FURTHER that any and all valuable consideration received on account of the transfer of the subject property to the third person by any person whose property is liable to forfeiture pursuant to this section shall be so forfeited. Such forfeiture under this subsection shall be in addition to such other civil liabilities as may be recognized by law, and shall be subject to such superior rights in properties that the persons claiming by, through or on account of the individual who so requested the advice.

Source: S.L. No. 4L-21-96 §20, 10/25/96

Note: S.L. No. 4L-21-96 §21 was codified as 42 PC 2-101.

41 PC 5-121. Regulations.

The Governor is empowered to issue rules and regulations for the proper administration of this chapter, which rules and regulations shall carry the force and effect of law.

Source: S.L. No. 4L-21-96 §22, 10/25/96